IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 159.

WILLIS D. WILLIAMS AND AZEL WILLIAMS,
Plaintiffs in Error,

v.

THE UNITED STATES OF AMERICA,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

PETITION FOR REHEARING.

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Willis D. Williams and Azel Williams, plaintiffs in error in the above entitled cause, respectfully petition this honorable court to set aside the judgment heretofore rendered in this cause and for a rehearing in the above entitled cause upon each of the following grounds, to-wit:

I. Counsel for plaintiffs in error, in originally determining whether the constitutionality of the Reed Amendment was an open question in this court so as to entitle a writ of error direct to this court, knew of the language in the case of *U. S. v. Hill,* 248 U. S. 420, 39 S. Ct. 143, arguing on power of Congress to enact the Reed Amendment,

and was satisfied such language was clearly dicta for three reasons:

a. The Hill case was brought to this court by the government under the Act of March 2, 1907, the purpose of which act as construed by this court was to enable the government to avoid a miscarriage of justice because of a ruling adverse to the government prior to a final judgment, from which ruling the government before this act had no appellate relief. The purpose of that act not being to open here the whole case, but merely to permit a ruling by this court on certain questions provided for by statute which had been decided adversely to the government below. In other words, this court has apparently stated that it, receiving its sole authority and jurisdiction in appellate cases from acts of Congress, could decide no questions except those decided below. The Hill case shows no constitutional question was decided below and the Solicitor General in his motion to dismiss or affirm admits that in the Hill case "the constitutionality of the act was not directly assailed." There was a grave question whether the constitutionality of the act could have been decided in the Hill case. Counsel knows of no case in which this court has held it had such authority under the Act of March 2, 1907, when the question was not decided below; on the other hand, that this authority was not given under that act has been indicated in the opinions of this court. (Main brief, pp. 33-35.)

b. The constitutionality of the act not being in issue, all that was said on the subject was dicta.

c. The universal rule of this court and of the courts generally is that courts do not pass on constitutional questions unless raised and unless a decision of such question is necessary. Such a question was not raised.

Counsel being thus satisfied that the question was not foreclosed in this court and being mindful of a possible division of this court expressed in the opinions in the Hill case, and also mindful that the Hill case was in effect *ex parte* the government, made a thorough and exhaustive study of the Reed Amendment, feeling that this court, so far as its decisions were concerned, was open minded on the question, and endeavored to point out in briefs filed herein a pronounced distinction, both by virtue of their operation and from a historical standpoint, between the Webb Kenyon law and the Reed Amendment, and presented to this court certain constitutional provisions and fundamental principles which in counsel's opinion the Reed Amendment violated, and which this court, counsel believes, has not considered prior to the case at bar.

Counsel, at pages 33 to 35 of main brief, and at pages 7 to 11 of supplemental brief, endeavored to get before this court the fact that the Hill case was brought here by the government under the Act of March 2, 1907. However, in the case at bar the court in its opinion, recollecting the Hill case as a "conviction," stated that "the conviction was sustained and the statute of necessity upheld." And the court in its opinion in the case at bar concludes that the Hill case and others plainly and unequivocably establish the want of merit in the constitutional question relied upon. As the fact that the Hill case sustained a conviction was material in the mind of the court in reaching its conclusion as to the effect of that case, even more so was the fact that the Hill case came here under the Act of March 2, 1907, a material consideration in counsel's mind.

An affirmance of a conviction puts in force a final judgment of a court, and such affirmance can only be had at the instance of the aggrieved party.

To hold that the Hill case decided the constitutionality of the Reed Amendment is a new holding and involves both the construction of the Act of March 2, 1907, and a decision of a question of policy in determining whether the government should be permitted to take cases of construction of a statute to this court and get binding rulings on the constitutionality of the act, in many cases in effect *ex parte*, and always before the party defendant has become interested to the extent of having a judgment against him.

For counsel to have reached the conclusion that the Dan Hill case decided the constitutionality of the Reed Amendment, counsel would have been compelled to assume each of the following things:

1. That this court, in the face of the statements referred to in printed argument heretofore filed, was exercising under the Act of March 2, 1907, an authority which it had previously indicated it did not possess.

2. That this court in the Hill case passed on the constitutionality of an act of Congress when such an issue was not before it for decision.

3. That this court passed upon the constitutionality of an act of Congress when its decision could have rested on other grounds, and when such question was not raised.

Therefore, it is submitted that the court in the case at bar in rendering its opinion did so under a material misapprehension of the leading case relied upon both by the court and by the plaintiffs in error and a rehearing is necessary.

II. The other two cases in this court involving the Reed Amendment, cited in the foot note to the opinion in the case at bar, are *U. S. v. Gudger*, 249 U. S. 373, 39 S. Ct. 323; *U. S. v. Simpson*, 252 U. S. 465, 40 S. Ct. 364.

Both these cases were brought to this court under the Act of March 2, 1907.

In the Gudger case this court affirmed a discharge of a defendant because of a construction of the act, and in the Simpson case this court reversed a discharge of a defendant involving a construction of the act. Neither case had in it any question as to the constitutionality of the act. The Simpson case was decided after the writ of error was taken in the case at bar.

Of the nineteen other cases cited in the note to the opinion in the case at bar, four were in trial courts and fifteen were in courts of appeal. Of this fifteen, two did not rule on a conviction under the Reed Amendment, seven affirmed convictions under the Reed Amendment, and six reversed convictions under the Reed Amendment. None of the rulings in the last named thirteen cases was based on the constitutionality or unconstitutionality of the Reed Amendment, which question was not discussed in those cases except in one which was reversed. Three of the trial court's decisions expressly held the act constitutional.

III. The Webb Kenyon law was a release of intoxicating liquor in interstate commerce to the control of the states. Therefore, the Webb Kenyon law was uniform. (Main brief, pp. 37, 38, 39, 71.)

IV. Both the Clark Distilling Company and Hill cases were apparently considered by this court on the theory that there was no constitutional provision requiring uniformity and forbidding preferences.

V. A Federal statute which prohibits an article from going into a part of the states, which article such states permit to come in and permit to be used, violates the no preference clause of the Constitution. (Main brief, pp. 39, 42-48, 71.)

VI. This inherent defect in this legislation can be ascertained from a reading of the act alone, because the act of the Legislature bringing the Reed Amendment in operation, i. e., prohibiting manufacture for beverage purposes, is not in itself conclusive that such state forbids personal or other lawful use or introduction of intoxicating liquors for personal or other lawful use. To relieve us of the necessity of arguing the question, it is necessary to refer only to the West Virginia statute. The West Virginia and Indiana statutes do not render an act of Congress void, but merely furnish conclusive evidence of its inherent invalidity. (Main brief, pp. 40, 42-48, 73.)

VII. If this court should hold a statute valid which forbids the shipment of cigarettes into a state prohibiting their sale to minors, then my contention is correctly understood and I am correctly overruled on the question of the constitutionality of the Reed Amendment. If such a statute is invalid, by the same token the Reed Amendment is invalid.

VIII. A Federal statute forbidding articles to go into a state which permits them to be brought in and used, and does not make the same prohibition as to all states, not only is not geographically uniform, but the states as to which no restriction is made are preferred by such an act in violation of the Constitution. (Main brief, pp. 39, 42-48.)

IX. The Constitution does not require that states shall be preferred or discriminated against uniformly, but that there shall be no preference or discrimination as to any state. (Main brief, pp. 57, 70; supplemental brief, pp. 4-6.)

X. This requirement is based upon the fundamental principle that the only restraint upon possible action by Congress is the responsibility of its members to their constituents. This responsibility is lost if legislation of the

specie of the Reed Amendment is valid. (Main brief, pp. 60-62, 69.)

XI. It is little solace to a group of states, or to their citizens, to know that they have been uniformly discriminated against. The purpose of the Constitution was to require Congress to legislate the same restraints upon all states, or to restrain action within particular states only to the extent that such states themselves should do so.

XII. The Constitution does not say that because a state forbids manufacture or sale of liquor it thereby loses its right not to be discriminated against in respect to that which it has not forbidden. (Main brief, pp. 48-59, 60-62.)

XIII. It may be admitted that all states which forbid the manufacture or sale of intoxicating liquor are treated as among themselves uniformly; but that does not satisfy the requirement of the Constitution when legislation imposing greater restraints in such states than those states themselves make excludes its operation from a part of the states. (Main brief, pp. 57, 59.)

XIV. Suppose Indiana forbids the manufacture of intoxicating liquor for beverage purposes and Kentucky does not, and a man comes down the Ohio River from Cincinnati, Ohio, with a quart bottle of whiskey in his pocket and lands at Evansville, Indiana. He is arrested by a United States marshal and put in jail. If he had landed across the river at Henderson, Kentucky, the United States marshal there could, with propriety, have entertained him as a law-abiding individual. Why? Not because intoxicating liquor is any more injurious to the man in Evansville than in Henderson, not because Indiana forbade his landing in Evansville, but because Congress has preferred the port of Henderson, Kentucky, to the port of Evansville, Indiana, in fact all the ports of Kentucky to all the ports of Indiana.

The same result would happen in going up the Ohio River to West Virginia ports and Kentucky and Pennsylvania ports. If the law is unconstitutional in West Virginia or in any state it is unconstitutional everywhere. (Main brief, pp. 40, 41.)

XV. It is suggested that the writ of error in this case is also well founded under Sec. 238 of the Judicial Code in that the questions presented in this case involve the construction and application of the no preference and other clauses and fundamental principles of the Constitution of the United States pointed out in printed arguments heretofore filed. (Main brief, pp. 43-80, and supplemental brief.)

Reference is made to, and consideration most respectfully urged of, the merits of my contentions as to the unconstitutionality of the Reed Amendment at pages 33-80 of main brief and in supplemental brief, where the above and other points are fully discussed and argued.

Wherefore, it is most respectfully submitted that this court would err both from the point of the constitutionality of the Reed Amendment being an open question in this court and from the point of the actual constitutionality of the act itself in not rehearing this case to the end that this court may have these important questions presented once by counsel before finally deciding them, and it is most respectfully requested that counsel, who has given this matter long and exhaustive study, and who fears that by printed argument alone he has not been able to state his propositions clearly, be permitted to present orally his contentions before this court.

Respectfully submitted,

MILTON W. MANGUS,

Attorney for Plaintiffs in Error.

CERTIFICATE OF COUNSEL.

The undersigned, attorney for Willis D. Williams and Azel Williams, plaintiffs in error in the above entitled cause, hereby certifies that the above petition for rehearing is made in good faith, said petition is not for purposes of delay, and that in my opinion said petition is well founded in law.

MILTON W. MANGUS,

Attorney for Plaintiffs in Error.